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EXCLUDED LEASES IN NEW SOUTH WALES

by

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The N.S.W. *Landlord and Tenant (Amendment) Act* 1948-1958 now makes provision in s. 5A for the exclusion of premises from the provisions of the Act which are the subject of a lease which is registered in the office of the Rent Controller. Formerly the sole means of obtaining even partial exclusion was under s. 86, which allowed exclusion only for a specified term in respect of a lease for such a term. Section 5A, however, has no requirement that the lease should be for a specific defined term.

In *Bignell* v. *Formosa*,[1] FERGUSON, J., held that after the expiry of the term granted by a s. 5A lease, if rent is tendered and accepted a tenancy at will arises, upon which the full provisions of the Act operate. It has also been argued that even if rent is not accepted all the provisions of the Act will operate after the expiry of the term, but in *Montgomery* v. *Francis*[2] the Full Court rejected that argument in respect of leases registered under s. 86 and it seems the argument would also be rejected in respect of s. 5A.

Notwithstanding these decisions, the professional practice in the main has been to grant leases for a fixed term and to have a holding-over clause. Reliance has been placed on the registration of the holding-over clause to maintain the exclusion of the premises after the expiry of the term. The form of lease approved by the Real Estate Institute for leases intended to be registered under s. 5A contains such a holding-over clause.

This practice has now been held to have been incorrect by the decision of MANNING, J., in *Thorn* v. *Martin*.[3] In that case, the lease was for a term of one week and it contained the following holding-over clause:

> "Provided that if the said Lessor permits the said Lessee to continue in occupation of said premises after expiration of said term of *one week* the tenancy shall continue as a weekly tenancy only at a rental of £6 6s. per week to be determined by a week's notice in writing from either party hereto."

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[1] (1959), 76 W.N. (N.S.W.) 451.
[2] (1959), 76 W.N. (N.S.W.) 572.
[3] 22 February, 1960, as yet unreported.

MANNING, J., held that after the expiry of the term, i.e., the first week, and the payment and acceptance of rent under the holding-over clause the premises then came back under all the provisions of the Act. His Honour said:

"The holding-over clause does not purport to grant any estate or interest to the Lessee. It is no more than a statement of what consequences shall follow in the event that the Lessor permits the Lessee to continue in occupation. In any event, if such permission were granted it might or might not be on the terms mentioned because the parties would always be at liberty to constitute further terms. However this may be, clause (g) of s. 5A requires that the premises shall be the subject of a lease which is firstly registered in the office of the Rent Controller and, secondly, the execution of which by the Lessee is witnessed by an independent solicitor.

"Counsel for the Lessor has been driven to argue that the definition of 'lease' contained in s. 8 is in terms which include not only a written contract but also one which is implied or is made orally. Although I should think that the Lessor is probably entitled to very great consideration, if one has regard to the moral issues involved, it seems to me regrettable that his argument cannot prevail. Section 8 begins by providing that in the Act 'Unless the contrary intention appears'—and then follow a number of definitions, including that of 'lease' which I have mentioned. It seems to me impossible to say that a lease which is partly in writing and partly oral or partly by conduct, is one which can be registered in the office of the Controller. I know of no machinery providing the registration of an estate arising by implication as the result of the conduct of the parties. That is not registering a lease.

"Secondly, the section requires the lease to be executed by the Lessee and it must be witnessed by an independent solicitor. I think this means that the document which creates the estate must be in writing and must be witnessed by an independent solicitor who is required to put his signature to it."

The effect of this decision is that whether or not a holding-over clause is included in the lease registered under s. 5A, if the lease is for a fixed term, then on the expiry of the term the tenant must be evicted promptly, and no rent whatever accepted. The wise practice would seem to be to give a Notice to Quit expiring on the last day of the lease, and promptly thereafter to issue a writ in ejectment.

If the registered lease includes a holding-over clause, then, even if it is intended to grant a further lease, until the further lease is actually executed as required by s. 5A, ejectment proceedings should be commenced and proceeded with. The reason for this is that a person holding over with the permission or approval of the landlord would become a tenant by the operation of the holding-over clause, regardless of whether rent is tendered or accepted or not.

The solution of this dilemma in respect of future leases is quite simple. If it is desired to grant the tenant a fixed term then the lease should be expressed to be, for example, "for a term of five years commencing on the first day of July, 1960, and from week to week thereafter until determined by a week's notice in writing from either party hereto, at a weekly rental of ——". Or if a fixed term is not desired, then the grant should simply be of a tenancy from week to week. In either case a holding-over clause is superfluous.

In respect of the thousands of leases which have already been registered which include holding-over clauses, however, it would seem that unless the legislature takes pity on everyone, both landlords and tenants will be put to a great deal of expense and trouble to put matters right again.

CURRENT LEGISLATION

QUEENSLAND

The Insurance Act of 1960 (No. 1). Assent: 10 March 1960; operation by proclamation.

An Act to consolidate and amend the law relating to carrying on of insurance business in Queensland.

The State Government Insurance Office (Queensland) Act of 1960 (No. 2). Assented: 10 March 1960; operation by proclamation.

The Workers' Compensation Acts Amendment Act of 1960 (No. 3). Assent: 10 March 1960; operation by proclamation.

Australian Conveyancer and Solicitors Journal, July, 1960.

THE DESERTED WIFE IN THE MATRIMONIAL HOME

A Further Addendum

by

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Any Australian discussion[1] of the attempt of the English courts to give the deserted wife something more than a simple personal right in the matrimonial home will probably reach the conclusion that it is a purely English aberration of no consequence in Australia.

However, there should be one important qualification. In *Brennan* v. *Thomas*,[2] SHOLL, J., considering the effect of an order made under s. 17 of the *Married Women's Property Act* 1882 (Eng.)[3] said:—

> "It may be that notice of such an order would affect the title of a purchaser for value from the husband, even if notice to him of the wife's position otherwise, and in the absence of such an order, would not."[4]

The purpose of this paper is to consider that suggestion more closely.

Married Women's Property Act

Section 17 provides a summary procedure for determining "any question between husband and wife as to the title to or possession of property" and the judge hearing the application is empowered to "make such order . . . as he thinks fit".

There has been a strong suggestion that this broad language is subject to a severe limitation — that the court has no power under the section to vary established titles to property. Thus in *Cobb* v. *Cobb*,[5] ROMER, L.J., expressly rejected the argument of counsel that the court had power under s. 17 to vary established title to property.[6]

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[1] See the earlier discussion by Janet M. Summers in (1959) 12 A.C. & S.J. 35.

[2] [1953] V.L.R. III.

[3] Corresponding provisions are:—N.S.W., *Married Women's Property Act* 1901, s. 22; Vic., *Marriage Act* 1958, s. 161; S.A., *Law of Property Act* 1936, s. 105; Qld., *Married Women's Property Acts* 1890-1952, s. 21; N.Z., *Married Women's Property Act* 1952, s. 19.

[4] [1953] V.L.R. 111 at p. 122.

[5] [1955] 2 All E.R. 696.

[6] [1955] 2 All E.R. 696 at p. 700.

Certainly in some later English cases — the most important of which was *Rimmer* v. *Rimmer*[7]—there were suggestions that the court did not need to concern itself with technical consideration of property rights. Rather the court should have regard to the intention of the parties and where there was no clearly expressed intention the presumption to be applied was that equality is equity.[8] In Australia this view was applied by the Victorian Supreme Court in *Wood* v. *Wood*.[9]

However, this trend was reversed by the decision of the High Court in *Wirth* v. *Wirth*,[10] where DIXON, C.J., emphasized that "proprietary rights in the case of married persons rests upon the law and not upon judicial discretion" and "the notion should be wholly rejected that the discretion affects anything more than the summary remedy".[11]

Some comments should be made:—

(1) The statements made in *Wirth* v. *Wirth* are quite consistent with, and indeed support, a power under s. 17 to prohibit the deserting husband from exercising his proprietary rights in the matrimonial home until he has provided his wife with suitable alternative accommodation. For instance, DIXON, C.J., stated that "the discretion conferred on the judge . . . doubtless enables him, in granting, withholding or moulding an order, to take into account considerations which may go beyond the strict enforcement of proprietary or possessory rights".[12] However, we shall need to consider to what extent such an order protects the wife effectively against third parties.

(2) It was thought that the Victorian legislature may have overcome the *dicta* in *Wirth* v. *Wirth* because the latest consolidation expressly provides that the power given to the judge to make such orders as he thinks fit extends to the making of orders for the sale of property and the division of the proceeds of sale or for the partition or division of property. Certainly SMITH, J., in *Ward* v. *Ward*,[13] considered that the section must now be construed as permitting orders inconsistent with ownership ascertained under the ordinary rules. However, this view was

[7] [1952] 2 All E.R. 863; [1953] 1 Q.B. 63.

[8] Per Evershed, M.R., at p. 867, and Denning, L.J., at p. 868.

[9] [1956] V.L.R. 478.

[10] (1956), 98 C.L.R. 228.

[11] (1956), 98 C.L.R. 228 at pp. 231-232.

[12] (1956), 98 C.L.R. 228 at p. 231. The factors to be considered by the judge were discussed in *Public Trustee* v. *Kirkham*, [1956] V.L.R. 64, and *Re Grose*, [1958] Qd. R. 269.

[13] [1958] V.R. 68 at p. 70.

rejected by the Full Court of the Victorian Supreme Court in *Noack* v. *Noack*.[14] Only unequivocal legislation will be interpreted as altering the fundamental legal rules concerning property rights.

(3) Even if title is to be established in accordance with the ordinary rules it is quite clear that the courts will not assume that the beneficial ownership is identical with the nominal legal ownership. There are a string of decisions[15] in which courts have held that although legal title was vested in the husband or, less commonly, the wife, the property might be held on trust for the spouses jointly. True there may be dispute on the question of how the respective shares are to be ascertained[16] but certainly where the wife has contributed at all to the purchase money the court is almost compelled to decide that she has an equitable interest in the property because it is clear that, with a few notable exceptions of which the most important is the presumption of advancement, the basic rule is that there must be clear evidence to support an obligation that a transaction between husband and wife was intended to be a gift.[17]

Protection under property legislation

A further complication arises when it is sought to obtain protection against third parties. Most States will have some provisions enabling the registration of *lis pendens* and orders affecting land.[18]

A person who took a conveyance of general law land with notice of such a registered order would presumably be bound by it — even though it was an order which gave the deserted wife no proprietary interest in the land but merely directed that the husband was not to convey any interest in the land until he provided the wife with suitable alternative accommodation.

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[14] [1959] V.R. 137.

[15] In *Re Palmer's Question*, [1952] S.A.S.R. 218; *Rimmer* v. *Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; *Ward* v. *Ward*, [1958] V.R. 68.

[16] See *Cobb* v. *Cobb*, [1955] 2 All E.R. 696; Milner (1959) 37 *Canadian Bar Review* at pp. 478-488.

[17] See generally *Halsbury* 3rd ed., Vol. 19, at pp. 831-836. Recent examples of advancement are *Silver* v. *Silver*, [1958] 1 All E.R. 523 and *Richards* v. *Richards*, [1958] 3 All E.R. 513.

[18] The main provisions are:—
N.S.W., *Conveyancing Act* 1919-1954, ss. 185-6; Vic., *Property Law Act* 1958, ss. 209, 213; S.A., *Law of Property* Act 1936-1956, s. 11 (amending the *Registration of Deeds Act* 1935); W.A., *Registration of Deeds Ordinance* 1856, ss. 2, 3; Tas., *Registration of Deeds Act* 1935, ss. 11, 26. Sometimes the relationship between a general system of registration of judgments and the Torrens system can become most complex. See the discussion of the N.S.W. position by Baalman, "Experiment in Registration" (1944), 17 A.L.J. 350.

However, when we consider land held under the Torrens system the problem becomes more complex. The appropriate method of protecting an equitable interest is by caveat but a caveat may only be lodged by a person claiming an "estate or interest in land". What is a sufficient interest has been the subject of considerable judicial interpretation[19] but it would seem clear that a judicial order which merely postpones the disposal of the matrimonial home until the wife has been provided with suitable alternative accommodation does not give the wife a sufficient "interest" in the property.

On this reasoning the nature of the order made under the Married Women's Property Act is of crucial importance. If the wife can prove a proprietary interest in the home — and in many cases this will be possible — her interest may be recognized by the order and protected by the caveat.

However, what is the position if the court decides that the wife has no proprietary interest and merely orders that the husband shall not dispose of the matrimonial home until he has provided the wife with other accommodation?

Firstly a husband who disobeys such an order will be liable for contempt of court and this in itself will be sufficient to ensure the efficacy of the order under the Married Women's Property Act in many cases.

Secondly, it is possible that in some States the wife's rights may be protected under the existing legislation. For instance, in N.S.W. it is possible that protection could be obtained under the provisions of s. 12 (f) of the *Real Property Act* 1900-1956. In South Australia it would appear that the order could be lodged under s. 105 of the *Real Property Act* 1886-1945.[20]

In the other States the provisions of the Torrens system legislation dealing with writs and judgments[21] are difficult to adapt to meet this situation. Certainly they did not contemplate such orders and it is extremely doubtful whether they give any protection — except possibly in Queensland where the wording may permit an interpretation which would give some temporary protection. In any event the wife would presumably be entitled to invoke the ordinary jurisdiction of the court to grant an injunction prohibiting the Registrar from registering a dealing inconsistent with her rights.[22]

[19] See Baalman, *Commentary on the Torrens System in N.S.W.* (1951), pp. 276-8 and Fox, *Transfer of Land Act* 1954 (1957), pp. 102-3.

[20] But no protection is given to a *lis pendens*. See s. 250, *Real Property Act* 1886-1945 (S.A.).

[21] N.S.W., *Real Property Act* 1919-1954, s. 105; Vic., *Transfer of Land Act* 1958, s. 52; Qld., *Real Property Act* 1861, s. 91; W.A., *Transfer of Land Act* 1893, ss. 90, 133; Tas., *Real Property Act* 1862, s. 94 (as amended by s. 16 of the *Real Property Act* 1893).

[22] See *Walsh* v. *Alexander* (1913), 16 C.L.R. 293.

Conclusions

1. In many cases a deserted wife will be adequately protected where the defaulting husband has the legal title to the matrimonial home by an order made under the Married Women's Property Acts.

2. This is certainly true where she can prove a proprietary interest and this interest is protected under the appropriate registration provisions.

3. Even in those cases where the order merely postpones sale the threat of contempt of court proceedings will make the order generally effective.

4. It would not upset the system of registered title if the existing legislation was amended to permit the registration of orders prohibiting sale for a specified period.

CASE NOTE

Subpoenas

Subpoena duces tecum—production of documents—objection to production.—On appeal to the Full Court in an action for damages for injuries alleged to have been caused by the negligent management and driving of a tram car, the Court discussed the rules relating to the production of documents the subject of a subpoena *duces tecum*. Their Honours declared that the person upon whom the subpoena is served should be asked in court to produce the document and he may be so asked even though he has not been sworn. Should he object to producing it then he must be sworn and the grounds of his objection to its production should be stated on oath so that the Court can decide on their adequacy, for a document produced by a witness is produced to the Court and not to the parties.

The members of the Court also pointed out that if the person subpoenaed states as his reason for not producing the document that he knows nothing of it then proof must be given not only of the existence of the document at the relevant time but of it being in the possession and control of such person before he could be dealt with for disobedience to the subpoenor. JORDAN, C.J., in *Commissioner for Railways* v. *Small* (1938), 38 S.R. (N.S.W.) 564 at pp. 573-575 referred to (*O'Born* v. *Commissioner for Government Transport* (1960), 77 W.N. (N.S.W.) 181 (STREET, C.J., CLANCY and WALSH, JJ.) (Supreme Court)).

COMPANY LAW IN THE AUSTRALIAN CAPITAL TERRITORY

by

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In recent years there has been a large increase in the number of companies registered in the Australian Capital Territory. The reasons for the increase are to be sought mainly in the field of taxation, in the broad sense of that word. The advantages are not, however, so extensive as may be popularly thought, but, used with care, they may be considerable. This matter will be covered in a subsequent article in this journal. The purpose of the present article is to place before the practitioner the salient aspects of the machinery of company law in the Australian Capital Territory.[1]

Generally speaking, the laws in force in the State of New South Wales immediately before 1 January 1911 have, so far as applicable, continued in force as laws of the Territory, unless other provision has been made either by Commonwealth legislation or by the exercise of the power conferred on the Governor-General of the Commonwealth to make ordinances having the force of law in the Territory.[2] In fact, "other provision" has been made in quite a number of cases and, accordingly, it is not always safe to rely on New South Wales law as a guide to the law existing in the Territory.

So far as companies are concerned, there have, over the years, been several ordinances, but it may be taken that the present law is contained in the Companies Ordinance 1954, and in a number of associated ordinances dealing with specific matters or specific types of corporate bodies.[3] It is provided by the Companies Ordinance 1954 that the provisions of the *Companies Act* 1936 of the State of New South Wales shall apply in the Territory as a law of the Territory, subject to certain provisions in the Ordinance.

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[1] For a detailed treatment by the writer, see Butterworth's Australian Company Forms and Precedents, Cumulative Supplement, 1958-1959, or The Australian Encyclopaedia of Forms and Precedents, Cumulative Supplement, 1956-1959.

[2] Seat of Government Acceptance Act 1909-1955, s. 6; Seat of Government (Administration) Act 1910-1955, ss. 3, 4, 12.

[3] See the Companies (Unclaimed Assets and Moneys) Ordinance 1950-1954, Associations Incorporation Ordinance 1953-1956, Co-operative Societies Ordinance 1939-1958, and Trustee Companies Ordinance 1947-1954.

These provisions relate to the interpretation of the Act in its application in the Territory, and also provide for a large number of modifications of the Act.[4]

Originally, the Ordinance also applied to the Territory the Companies Regulations, 1936, of New South Wales,[5] but these were repealed when regulations were made for the Territory in 1956.[6] One still has to have recourse to the repealed regulations as the forms set out in Schedule Two to the Companies Regulations 1936 of New South Wales, as in force in that State immediately before the date of commencement of the 1956 Regulations,[7] are, subject to the modifications set out in the First Schedule to the 1956 Regulations, the prescribed forms for the Territory for the purposes of the Act.[8] Where a form contains a form of declaration in accordance with the *Oaths Act* 1900, of New South Wales, the declaration may be made in accordance with the appropriate Commonwealth Act, which is now the *Statutory Declarations Act* 1959, and the form may be altered accordingly.[9] It may be observed that strict compliance with the prescribed forms is not necessary and substantial compliance is sufficient. The fees specified in the Second Schedule to the 1956 Regulations are the prescribed fees in the Territory for the purposes of the Act.[10]

No amendments made in New South Wales of the *Companies Act* 1936 have any effect as such on the application of the Act in the Territory. Accordingly, it cannot be assumed that, merely because the *Companies Act* 1936 happens to be a law of the Territory, amending legislation in New South Wales automatically applies to the Territory. Such legislation can apply only if it has been made effective in the Territory by a Commonwealth Act, by an amendment of the Companies Ordinance, 1954, or by some other ordinance. Similarly, no amendments made in New South Wales, subsequent to 23 December 1956, of the forms in Schedule Two to the Companies Regulations 1936 of New South Wales have any effect on the use of the forms in the Territory, unless applied thereto by an ordinance, or by regulations made thereunder.

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[4] Companies Ordinance 1954, ss. 9, 10, and Third Schedule.

[5] Companies Ordinance 1954, s. 6.

[6] Companies Regulations 1956, made under the Companies Ordinance 1954, s. 24.

[7] 24 December, 1956.

[8] Companies Regulations 1956, regs. 3, 4.

[9] Companies Regulations 1956, reg. 4.

[10] Companies Regulations 1956, reg. 5.

The Territory has a separate administration of its company laws under its own Registrar of Companies.[11] The office follows in general the administrative procedures applicable in New South Wales.

It is proposed to indicate briefly the main variations between the law of New South Wales and that of the Territory, having regard to the changes in the *Companies Act* 1936 in its application in the Territory.

Incorporation and registration

As in New South Wales, it is necessary to distinguish between the formation and registration of a company in the Territory, that is to say, a local company, and the registration therein of a "foreign company", which expression includes, so far as the Territory is concerned, a company incorporated and registered in New South Wales.[12] Foreign companies will be referred to later.

The law as to the incorporation and registration of a company in the Territory, is, broadly speaking, similar to that in New South Wales. Thus the distinction between companies limited by shares, companies limited by guarantee, unlimited companies, limited companies with liability of officers unlimited and no-liability companies, and the distinction between public and proprietary companies, continue to apply. However, the provisions of Part VA of the *Companies Act* 1936,[13] relating to the transfer to New South Wales of the incorporation of certain foreign companies, have no force in the Territory.

A company limited by guarantee without share capital is the form usually adopted by non-profit associations in New South Wales, but not in the Territory where, unlike New South Wales, there is special provision by a separate ordinance for the incorporation of certain associations not for profit.[14] It is possible that the latter ordinance may not be availed of, and in such cases the provision of the *Companies Act* 1936[15] enabling the registration of certain such associations as companies with limited liability without the addition of the word "Limited" to their names is also effective in the A.C.T., the licence to dispense with the word "Limited" being sought, however, from the Attorney-General of the Commonwealth. Another variation in this connexion is that in the Territory such an

[11] Companies Ordinance 1954, ss. 7, 8.

[12] Companies Act 1936, s. 6, as modified by the Companies Ordinance 1954.

[13] Inserted by the Companies (Amendment) Act 1940, s. 2 (N.S.W.).

[14] Associations Incorporation Ordinance 1953-1956.

[15] Section 34.

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association (other than one formed for the purpose of promoting religion), while so licensed, may not, without the licence of the Attorney-General of the Commonwealth, hold more than two acres of land.[16] This provision was repealed in New South Wales in 1955.[17] There is no such restriction on associations incorporated under the Associations Incorporation Ordinance, 1953-1956.

Name of company

With regard to restrictions in the Territory on the registration of a company in respect of its proposed name, and the reservation of names, it is advisable to consult the Ordinance in view of the new substituted rules relating thereto introduced by the Companies Ordinance 1954.[18] The corresponding law of New South Wales therefore no longer applies in the Territory. The new section allows the use of the abbreviation "Ltd." in lieu of the word "Limited" contained in the name of a company.

A company incorporated in the Territory may by special resolution, and with the approval of the Attorney-General of the Commonwealth, change its name.[19] Where a company has been registered under a name referred to in the territorial provision restricting the use of certain names, the Registrar may, by notice in writing, require the company to change its name to a name which is not a name referred to in that provision, and, for the purpose of complying with the requirement, such company may change its name without obtaining the approval of the Attorney-General.[20]

The provision enabling a name to be reserved for a proposed company has been extended so as to enable a company proposing to change its name, or a person on its behalf, to have the proposed new name reserved for the company, the period of reservation in either case being thirty days.[21]

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[16] Companies Act 1936, s. 34 (6).

[17] Companies (Amendment) Act 1955, s. 2.

[18] Companies Act 1936, s. 32, as substituted by the Companies Ordinance 1954. The alterations in N.S.W. law by the Companies and Business Names (Amendment) Act 1957 have no effect in the Territory.

[19] Companies Act 1936, s. 35 (1), as modified by the Companies Ordinance 1954.

[20] Companies Act 1936, s. 35 (2), (2A), (2B), as substituted for s. 35 (2) by the Companies Ordinance 1954. Section 35 (2) has been omitted in N.S.W. by the Companies and Business Names (Amendment) Act 1957, s. 2 (b) (ii).

[21] Companies Act 1936, s. 32 (2) as substituted by the Companies Ordinance 1954. This extension has also been carried out in New South Wales by the Companies and Business Names (Amendment) Act 1957, s. 2 (a), but the period of reservation in either case in N.S.W. is now sixty days.

Memorandum and Articles of Association

Consistently with the provision already mentioned concerning the name of a company, the sections of the *Companies Act* 1936 relating to the contents of the memorandum of a company limited by shares or by guarantee[22] have been modified by the Companies Ordinance 1954, so as to allow the use of the abbreviation "Ltd." instead of the word "Limited" in the memoranda.

More important to note, however, is the requirement, arising from the interpretation placed on the *Companies Act* 1936 by the Companies Ordinance 1954, that the memorandum must indicate that the registered office will be *situate within the Territory*.[23] Further, there is the provision, as in New South Wales, that every company is required, as from the day on which it begins to carry on business or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, to establish and register an office to which all communications and notices may be addressed, and to register any change in the situation of such registered office.[24] Thus it is not sufficient merely to incorporate a company in the Territory; it is essential also to establish a registered office there.

The *Companies Act* 1936 requires that the memorandum and articles of association be printed.[25] In the Territory, unlike New South Wales, "printed" includes typewritten, lithographed, or reproduced by other mechanical means.[26]

Unclaimed assets and moneys

The *Unclaimed Moneys Act* 1917 of New South Wales does not apply in the Territory, the corresponding law being the Companies (Unclaimed Assets and Moneys) Ordinance 1950-1954. In New South Wales, it has been held that unclaimed moneys payable by a company in voluntary liquidation are unclaimed moneys within the meaning of the *Unclaimed Moneys Act* 1917.[27] It may be observed, however, that the Ordinance, unlike the Act, has specific provisions relating to unclaimed assets in the hands of liquidators.[28]

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[22] Sections 10, 11.

[23] Companies Act 1936, ss. 10, 11, 12, as interpreted by the Companies Ordinance 1954, s. 10.

[24] Companies Act 1936, s. 75.

[25] Companies Act 1936, ss. 13, 19.

[26] Companies Act 1936, s. 6, as modified by the Companies Ordinance 1954.

[27] *Re Sydney Permanent Freehold Land and Building Co. Ltd.* (1932), 15 W.N. (N.S.W.) 146.

[28] Sections 4, 5.

Registration of business-names

As in the States, every corporation carrying on business in the Territory under a business-name which does not consist of its corporate name without any addition is required to register the business-name.[29] Apart from the general rule, however, there is no provision similar to that in New South Wales whereby every corporation carrying on business within the State wholly or mainly as attorney, nominee, or trustee of or for a firm, individual or other corporation, or acting as general agent for any foreign firm, is required to register under and in accordance with the provisions of the Business Names Act.[30]

Common seal

Formerly, in the Territory, purchasers from a corporation aggregate did not have the statutory protection given in New South Wales and Victoria,[31] additional to that laid down in the cases,[32] with regard to the affixing of seals. However, the New South Wales provision has been applied to the Territory since 1958 subject to certain minor modifications.[33]

Investigation of company's affairs

The New South Wales provisions relating to the inspection of companies[34] do not apply in the Territory. Instead, this subject is covered by Part IV of the Companies Ordinance 1954.[35] In Part IV, which is to be interpreted as if it were part of the Companies Act, "company" includes a foreign company, and "officer or agent", in relation to a company, means a person who is, or has at any time been, a director, officer, agent, banker, solicitor, or auditor of the company.[36]

Application may be made to the Attorney-General of the Commonwealth for the appointment of one or more inspectors to investigate the affairs of a company and report thereon —

(a) In the case of a company having a share capital— on the application of not less than 200 members or of members owning not less than one-tenth of the shares issued;

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[29] Business Names Ordinance 1956, s. 6.

[30] Business Names Act 1934, s. 5.

[31] N.S.W., Conveyancing Act 1919-1954, s. 51A; Vic., Property Law Act 1958, s. 74.

[32] See, e.g., *Rama Corporation Ltd.* v. *Proved Tin and General Investments Ltd.*, [1952] 1 All E.R. 554.

[33] Law of Property (Miscellaneous Provisions) Ordinance 1958, s. 3 and Schedule.

[34] Companies Act 1936, ss. 116-119.

[35] Sections 11-21.

[36] Section 11.

(b) In the case of a company not having a share capital—on the application of not less than one-fifth in number of the persons on the company's register of members.

The applicants must furnish such evidence as is required to show that they have good reason for requiring the investigation, and they may be required to give security for payment of the costs of the investigation.[37] Without prejudice to his powers to appoint inspectors upon the application of members, the Attorney-General must appoint inspectors to investigate and report if a company by special resolution, or the court by order, declares that the affairs of the company ought to be investigated by an inspector appointed by the Attorney-General. Furthermore, the Attorney-General may make such an appointment if it appears to him that there are circumstances suggesting:

(i) that the business of the company is being conducted with intent to defraud its creditors or the creditors of another person or otherwise for a fraudulent or unlawful purpose or in a manner oppressive of any of its members or that the company was formed for a fraudulent or unlawful purpose;

(ii) that persons concerned with the formation of the company or the management of its affairs have, in connexion with that formation or management, been guilty of fraud, misfeasance, or other misconduct towards it or towards its members;

(iii) that its members have not been given all the information with respect to its affairs that they might reasonably expect.[38]

There are provisions giving the inspector access to premises and to records, and he has wide power to obtain information and examine witnesses.[39] Interim reports to the Attorney-General may be made by the inspector, and on the conclusion of the investigation he must make a final report to the Attorney-General, who must forward copies of reports to the registered office of the company, and also to certain persons, or to the court, in accordance with the terms of s. 17.

The Attorney-General may institute proceedings for a prosecution on the basis of a report, and it is then the duty of all officers and agents of the company (other than the defendant in the proceedings) to give all assistance in

[37] Section 12.

[38] Section 13.

[39] Sections 14, 15.

connexion with the prosecution that they are reasonably able to give.[40] The Attorney-General may also present to the court, in consequence of a report, a petition for the winding up of the company.[41]

Vesting of property of dissolved company

The provisions under which the Registrar-General in New South Wales may deal with the undisposed of property of a dissolved company have been amended in their application to the Territory. Thus, in the Territory, the Registrar is required to pay the balance of any moneys received by him, after defraying expenses and making payments authorized by the Act, to the Treasurer for payment by him into the Consolidated Revenue Fund of the Commonwealth. A person claiming any such money may seek an order from the court for payment to him of the sum due to him, and upon the making of such an order, or where he is otherwise satisfied that a person is entitled to any such money, the Treasurer must pay an amount equal to that money to that person. These provisions do not deprive a person of another right or remedy to which he is entitled against the liquidator or another person.[42]

Foreign companies

The definition of "foreign company" has been modified in its application to the Territory so as to mean a company (including a society) incorporated outside the Territory (e.g., a New South Wales company) which establishes a place of business or carries on business within the Territory.[43]

The provisions of Part VI of the *Companies Act* 1936,[44] relating to foreign companies, apply in the Territory subject to the necessary modifications. Thus every such company must, within one month from the date of the establishment of a place of business or the commencement to carry on business, register under Part VI and file certain documents with the Registrar.[45] The company's agent for the purposes of the Act must reside in the Territory. A most important provision is that every foreign company registering in the Territory must have a registered office within the Territory.[46]

[40] Section 18.
[41] Companies Act 1936, s. 210 (2), as substituted by the Companies Ordinance 1954.
[42] Companies Act 1936, s. 326 (3), (4), (5), (6), (7), as substituted for s. 326 (3) by the Companies Ordinance 1954.
[43] Companies Act 1936, s. 6, as modified by the Companies Ordinance 1954.
[44] Sections 61-74.
[45] Section 62; and see Companies Regulations 1956, regs. 7-11 (A.C.T.).
[46] Section 63 as modified by the Companies Ordinance 1954.

The usual reason for registering as a foreign company in the Territory is to facilitate the establishment of a branch register of members there, and, in this connexion, attention is particularly drawn to the definition of "to carry on business" as including the establishing or using of a share transfer or share registration office. On the other hand, a company will not be deemed to carry on business in the Territory by reason only of its investing its funds or other property there.[47] There are other difficulties, which arise from the particular statutory requirements of the States, in which the companies seeking registration in the Territory are incorporated. Thus a company incorporated in New South Wales, which wishes to keep a branch register in the Territory, must observe the relevant law as contained in the *Companies Act* 1936.[48] These matters will be considered in relation to all the States in the later article dealing with the possible advantages of registration in the Territory.

The Registrar may refuse to register, or may cancel the registration of, a foreign company the name of which is a name referred to in s. 32 (1) of the *Companies Act* 1936, as substituted by the Companies Ordinance 1954, and such company may not then carry on business or establish or keep a place of business in the Territory.[49]

With regard to the provision for notice being filed with the Registrar of a foreign company's ceasing to carry on business in the Territory,[50] it is further provided in the Territory[51] that, at the expiration of twelve months after the filing by a company of such a notice, the Registrar may, unless cause to the contrary is shown by the company, strike its name off the register. Until removal of the name of the company from the register, any process or notice may be served on the company as provided by s. 66 of the *Companies Act* 1936. Most of the general provisions of the Act relating to defunct companies being struck off the register[52] also apply, so far as applicable, to foreign companies registered in the Territory, where the Registrar has reasonable cause to believe that the company is not carrying on business in the Territory.

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[47] Companies Act 1936, s. 74, as modified by the Companies Ordinance 1954.

[48] Sections 86, 87.

[49] Companies Act 1936, s. 70, as substituted by the Companies Ordinance 1954.

[50] Companies Act 1936, s. 72 (1).

[51] Companies Act 1936, s. 72 (1A), (1B), (1C), as inserted by the Companies Ordinance 1954.

[52] Companies Act 1936, s. 323 (1), (2), (3), (6).

It has previously been noted that the provisions[53] enabling a company incorporated in any part of Her Majesty's Dominions outside New South Wales to be registered and incorporated under the New South Wales Act under certain conditions has no application to the Territory.

Notices and advertisements

Certain sections of the *Companies Act* 1936 requiring the publication in newspapers of notices or advertisements relating to various matters have been modified by the Companies Ordinance, 1954, so as to provide for publication in a newspaper published and circulating in the Territory, instead of in the newspapers designated in those sections.[54] Where publication in the *Gazette* is required, this is to be read as referring to the Commonwealth of Australia Gazette.[55]

[53] Companies Act 1936, Part VA, as inserted by the Companies (Amendment) Act 1940, s. 2.

[54] See Companies Act 1936, ss. 44, 67, 82, 182, 271, 273 and 280.

[55] Companies Ordinance 1954, s. 10.

NOTES FROM WESTERN AUSTRALIA

by

J. P. GUILFOYLE

Superannuation for W.A. lawyers

A superannuation scheme for lawyers, drawn up on the same lines as those of comparable schemes in other States of Australia, has now been instituted for West Australian lawyers. The scheme is administered by an incorporated Association known as Law Trusts, the first Board of Management (answerable to the Council of the Law Society) being Messrs. P. R. Adams, G. D. Wright and I. G. Medcalf.

World tour for the Chief Justice of Western Australia

Sir Albert Wolff, K.C.M.G., Chief Justice of Western Australia, and Lady Wolff, left Perth on the first stage of a world tour on March 8. The Chief Justice has been granted twelve months' leave of absence. A farewell party for the Chief Justice was given by members of the Law Society at the Palace Hotel, Perth.

New acting-judge of the Supreme Court of Western Australia

The Executive Council of the Government of Western Australia has appointed John Hale, Q.C., an acting-judge of the Supreme Court from 1 March, 1960. The Government intends to introduce into Parliament a Bill authorizing the appointment of another judge and on the passing of the Bill Mr. Hale's appointment will be made permanent.

The Attorney-General, in referring to Mr. Hale's appointment stated that the Government wants circuit courts in the bigger provincial towns such as Albany, Bunbury and Geraldton. This would give better opportunities to local legal practitioners, and also save expense for litigants in bringing themselves and witnesses to Perth.

Mr. Justice Hale was born in Perth in 1905, and was educated at Radley College, England. He has been in private practice since 1929. From 1948 to 1950 he was President of the Law Society of Western Australia, and he was appointed a Queen's Counsel in 1952.

The new judge was welcomed to the Bench at a special sitting of the State Full Court on February 29.

CASE NOTE

Mistaken Identity in Contract

Contract — sale of motor car — authorized agent for sale falsely representing herself to be and assuming the name of the owner—whether the property in the car passed to the purchaser.—The appellant was the registered owner of a motor car which she sold to a third party. A cheque for the price was dishonoured on presentation and the appellant obtained a default judgment for the unpaid purchase money against the third party. The latter authorized a woman friend to sell the car and gave her the certificate of registration of ownership and a notice of change of ownership in the prescribed form signed by the appellant. Representing herself to be the appellant, the owner of the vehicle, and producing the certificate the woman sold the car to the respondent and signed the notice of change of ownership in the appellant's name, forging the latter's signature.

The Court of Appeal held by majority judgment that as the respondent had intended to deal with the owner of the car in order to obtain title to it and the name of the appellant as such meant nothing to the respondent, the false identity assumed by the woman, who had authority to sell the car, did not prevent the property in the car from passing to the respondent. The majority judges distinguished the well-known cases of *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, and *Hardman* v. *Booth* (1863), 1 H. & C. 803, where the intention had been to contract solely with a well-known firm of considerable reputation in the trade, and pointed out that the vendor's intention to pass the property was the test to be applied. Where, as in the above cases, the person with whom the vendor dealt personated someone well-known and trusted, at least by reputation, or fraudulently alleged the authority of the same, then no contract could be said to come into existence for the person defrauded only intended to deal with the reputable person or firm and no one else. There was no union of minds between the parties for the vendor's mind went out to a totally different person. However, where, as in the present case, the intention was merely to contract with someone who could pass a good title to the goods and not with a specified person then the mistake as to identity was insufficient to avoid the contract *ab initio*. There was consensus with the person identified by sight and hearing, who was, for the purposes of the case, the true owner, and that was the vital consideration for the respondent. *Fawcett* v. *Star Car Sales Ltd.*, [1960] N.Z.L.R. 406, N.Z. Court of Appeal (NORTH and CLEARY, JJ., GRESSON, P., dissenting).

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